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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-656

ORVAL C. LOGUE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (A. 616–623) is reported at 459 F. 2d 408. The subsequent order denying rehearing and rehearing *en banc* and a dissenting opinion (A. 624–630) are reported at 463 F. 2d 1340. The opinion of the district court (A. 607–613) is reported at 334 F. Supp. 322.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1972. A petition for rehearing was denied on July 31, 1972. The petition for a writ of certiorari was filed on October 28, 1972, and was granted on

January 8, 1973. The jurisdiction of this Court rests upon 28 U.S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether a Deputy United States Marshal, in transferring custody of a suicidal federal prisoner to a state prison facility, satisfied his duty of care to the prisoner by relying on the representation of his supervisor that arrangements had been made for the jail to provide continuous observation of the prisoner, and on the assurance of the state jailer that those arrangements would be carried out.

2. Whether a state prison facility in which federal prisoners are placed pursuant to contract is a "contractor," whose employees, under the Federal Tort Claims Act, are not "employee[s] of the Government" for whose negligent acts the United States is liable.

STATUTES INVOLVED

The relevant provisions of 28 U.S.C. 1346(b), 2671, and 2674, and 18 U.S.C. 4002, 4042, and 4086 are set forth in Appendix A to this brief, *infra,* pp. 41–43.

STATEMENT

On May 25, 1968, Reagan Logue, a federal prisoner confined in a state prison pending trial, took his own life. His mother and adoptive father brought this action in the United States District Court for the Southern District of Texas seeking damages under the Federal Tort Claims Act. They alleged that Logue's death was proximately caused by the negligent acts of federal employees.

A. THE INITIAL CONFINEMENT AND ATTEMPTED SUICIDE

On May 22, 1968, Deputy United States Marshal Del Bowers, temporarily assigned to Corpus Christi, Texas, was notified that a federal warrant had been issued for the arrest of Reagan Logue on a charge of conspiracy to smuggle 229 pounds of marihuana into the United States (A. 312, 607). In the company of two customs agents, he proceeded to Logue's residence and placed him under arrest (A. 299–301, 314–318). After a hearing before a United States Commissioner, Logue was taken to the Nueces County Jail in Corpus Christi, which assumed custody over him pursuant to a contractual arrangement with the Federal Bureau of Prisons, by which the jail agreed to provide for the safekeeping, care, and subsistence of federal prisoners awaiting trial (A. 302–303, 320–321, 638–642).

In the afternoon of the next day, Logue cut his left wrist in an apparent suicide attempt (A. 19, 607).[1] He was taken to Memorial Hospital, where he was treated by an intern, Dr. James White, who, after attending to the wound, diagnosed Logue as acutely psychotic, admitted him to the hospital, and administered a tranquilizer (A. 111–113).[2] Logue was placed

[1] He had twice before made suicide attempts or gestures, one involving an overdose of sleeping pills and one involving gas (A. 199, 229–230).

[2] Logue was at this time "actively hallucinating" and out of touch with reality (A. 111). Dr. White apparently thought that Logue's psychotic reaction was secondary to LSD or other drug ingestion (A. 157). The arresting officers had detected the odor of airplane glue in Logue's house (A. 301, 317).

in a locked, bare room guarded by an off-duty sheriff's deputy (A. 97, 112, 323–324, 499–500). That evening, Dr. Shannon Gwin, the hospital's staff psychiatrist, visited Logue and assumed responsibility for his care (A. 142–143, 155).

B. REMOVAL FROM THE HOSPITAL AND ARRANGEMENTS FOR RETURN TO THE JAIL

Deputy Bowers learned of the suicide attempt the next morning and proceeded to the hospital to check on Logue's condition. After observing security arrangements at the hospital and looking in on Logue, Bowers telephoned Dr. White, who informed him that Logue was admitted to the hospital because of his mental condition, not because of his wrist wound, which did not itself require continued hospitalization. He also advised Bowers to discuss the matter with Dr. Gwin because he had taken over as Logue's physician. (A. 322–327.)[3]

Dr. Gwin told Bowers he thought that Logue should be committed to a medical facility for rehabilitation, and that if he were returned to the jail in the meantime, precautions should be taken to prevent a further suicide attempt (A. 160, 327, 330, 333–334). He said he would release Logue from the hospital if there were a safe place to keep him at the jail (A. 343, 359,

[3] Dr. White's memory was that he told Bowers the patient should not be returned to jail because of the risk that he would again attempt suicide (A. 113–114, 136–137). Bowers did not recall White's "saying anything like that" (A. 326); White stated only that Logue "had a mental problem and that he had turned the case over to Dr. Gwin" (A. 327).

361). On the basis of Dr. Gwin's recommendation, Bowers initiated efforts to have Logue committed to a federal medical institution for a competency determination.

In a telephone report to his supervisor in Laredo, Deputy Marshal Gerald Jones, Bowers sought advice on arranging for a commitment order from the federal district court there. Logue's attorney, who also participated in the conversation with Deputy Jones, stated that he had been unable to reach the Assistant United States Attorney to request his help in having Logue committed. Jones thereupon related the facts to the Assistant United States Attorney who, together with Jones, sought out District Judge Ben Connally in chambers. The judge indicated he would sign a commitment order. (A. 55–57, 330–331, 377–383.)

Meanwhile, Deputy Bowers had telephoned Chief Deputy Thomas Slocomb in Houston to report on Logue. Slocomb directed Bowers to stand by for further instructions. (A. 97–98, 332.) Slocomb then telephoned Jones and inquired whether the Nueces County Jail had suitable facilities for holding Logue from the time he could be discharged from the hospital until his transfer to a federal medical facility.[4] Jones said he would speak with Chief Jailer Tom Lowrance about the matter. (A. 98, 378–379.)

In a telephone conversation with Lowrance, Jones stated that Logue would shortly be moved to a federal

[4] It ordinarily takes about a week or two after an order has been entered before a prisoner can be physically transferred to a mental institution, though the process can be expedited in an emergency (A. 100).

institution but that in the meantime he would probably be kept at the jail. Jones explained that Logue had attempted suicide and, in the doctor's judgment, remained suicidal. He inquired whether the jail could provide safe quarters for the prisoner and carefully detailed the special arrangements that would have to be made. In particular, he specified the cell must be one that "could be kept under surveillance" (A. 384), and it would have to be stripped of everything Logue could possibly use to hurt himself. Logue himself would have to be stripped of his clothing. (A. 98, 383–384, 401–402, 407.) Jones also suggested that jail "trusties" be placed either in the cell with Logue or outside the cell where they "could watch him continually" (A. 402).

Lowrance responded that he could and would make the arrangements specified by Jones. (A. 384, 407.)[5] Jones testified that, if his instructions had been followed by Lowrance, it would not have been possible for Logue to hang himself (A. 402); if Lowrance had given any indication that he would not follow those instructions, Jones would not have permitted Logue to be returned to the jail (A. 407).

Jones then telephoned Bowers, informed him of the conversation with Lowrance, and instructed him personally to inspect the jail to see that a cell was adequately prepared. If so, Bowers was to inform Dr.

[5] Lowrance's recollection of the conversation was somewhat hazier. He testified that he placed Logue in a cell by himself where he could be checked periodically, and that he considered this to be consistent with the instructions given to him by Jones (A. 435, 445).

Gwin of the arrangements that had been made and to ask him whether he would release Logue from the hospital[6] pending the transfer to a federal institution. Jones instructed him that if Dr. Gwin did not consider it advisable to release Logue, Bowers should leave him in the hospital. (A. 97–98, 353, 385, 403.)

Bowers inspected the cell prepared for Logue and found that it contained only a bunk with a mattress, a commode, and a wash basin; all other objects had been removed (A. 334–335). He then advised Dr. Gwin that the court had ordered Logue committed to a federal institution for observation and that special provisions had been made to keep him at the jail until he could be taken to the institution. Bowers stated that he had inspected the jail facilities and that in his judgment Logue would be safe there. Dr. Gwin said that under those conditions he would agree to release Logue. (A. 336, 348–349.)[7]

When Bowers took Logue back to the jail later that day, he personally checked the cell again and satisfied himself that it contained nothing dangerous. He had been told by Jones that the jail would keep

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[6] It was the unwavering policy of the Marshal's office that no prisoner would be removed from a hospital unless and until his physician released him (A. 393, 396–397), and Bowers was given specific instructions by both Jones and Slocomb to move Logue only if Dr. Gwin was prepared to release him (A. 343, 359, 362, 385, 403). It is also a policy to return a prisoner to jail as soon as possible, both for security reasons and because of economic considerations (A. 341, 347–348, 392), though the prisoner's health and safety are the first concern (A. 368).

[7] Dr. Gwin testified he had been under the impression that the court had ordered Logue returned to jail and that the matter was out of his hands (A. 160, 166).

Logue under observation, possibly by a "trusty" in an adjoining cell, and it was his clear understanding that suitable arrangements had been made for such observation. He also received assurances at the jail that someone would be watching Logue. Indeed, he testified that if he had not thought Logue would be kept under surveillance, he would not have left him there. (A. 345–346, 352–353.)

After leaving the jail, Bowers reported to Chief Deputy Slocomb that Logue had been recommitted to the jail. He stated that Logue's cell had been stripped of all dangerous objects and that it was "convenient for observation by the jail authorities" (A. 98).

C. PROCEDURES AT THE JAIL

Logue was placed in the cell prepared for him, which was part of the isolation block on the second floor. He was within hearing but out of sight of the other prisoners in an adjoining block on that floor (A. 23–24, 434). Chief Jailer Lowrance did not place trusties in the cell with Logue or nearby, and assigned no one the task of watching Logue. His instructions to his staff were "to check him and watch him all the time" (A. 439),[8] but this apparently was intended by him and understood by the staff to mean checking Logue periodically when they had other business on the second floor. The other prisoners were not told of Logue's condition and were not asked to watch him (A. 24).

[8] One jailer was told to "keep an eye on" Logue (A. 475); another was told "to keep pretty close watch on him" (A. 486).

Lowrance personally checked on Logue as many as six times the following day, usually in connection with bringing other prisoners to the second floor (A. 438–439). Other jailers also checked him several times (A. 451, 464, 469, 486). At 4:45 p.m. on May 25, some 15 minutes after he had been last observed, Logue was found by one of the jailers hanging in his cell (A. 450). He had apparently fashioned a noose out of the long Kerlix bandage that had been applied to his left arm at the hospital (A. 609).

D. THE PROCEEDINGS BELOW

The district court awarded petitioners damages of $6,164.50, representing pecuniary benefits lost to them plus Logue's funeral expenses (A. 611–613). It found that the government had been negligent in two respects, each of which was the proximate cause of Logue's death: (1) Deputy Bowers' failure to make "specific arrangements * * * for constant surveillance of the prisoner" (A. 608), and (2) the failure of the jailers to maintain adequate surveillance (A. 609). It held that the United States is not relieved of its responsibilities to those of its prisoners who are kept in a state prison facility pursuant to contract; rather, it is "bound" by the negligent acts of the jail's employees (A. 610–611).[9]

The court of appeals reversed. It held (1) that, since Deputy Bowers had no "power or authority to con-

[9] The court also held that the decision to remove Logue from the hospital and return him to the jail was a "discretionary" act which, under 28 U.S.C. 2680(a), could give rise to no liability on the part of the United States (A. 610).

trol any of the internal functions of the Nueces County jail," he "violated no duty of safekeeping with respect to the deceased" (A. 622), and (2) that the status of the jail as a "contractor" under 28 U.S.C. 2671 "insulates the United States from liability under the FTCA for the negligent acts or omissions of the jail's employees" (*ibid.*).[10]

SUMMARY OF ARGUMENT

I

A United States Marshal is under a duty to provide for the safekeeping and care of federal prisoners in his custody. If he commits a negligent act or omission proximately causing injury to such a prisoner, the United States is liable under the Federal Tort Claims Act.

The court of appeals properly held that Deputy Bowers' duty of care in the circumstances of this case did not require that he personally make arrangements for Logue's surveillance at the jail. He had a reasonable basis for believing that adequate preparations had already been made for the safekeeping of Logue. His supervisor had stated that the chief jailer agreed to place Logue in a stripped cell and to keep him under constant observation, and Bowers confirmed those

[10] On the denial of a petition for rehearing and rehearing *en banc*, three judges filed a dissenting opinion in which they expressed the view that Bowers failed to comply with a "duty to provide a reasonably safe place of confinement" (A. 627) and that the state jailers, in dealing with a federal prisoner, may have taken on the character of federal employees for purposes of federal tort liability (A. 628).

plans by personally inspecting the jail and speaking with the jailers. Under these conditions Bowers could not reasonably foresee that the chief jailer, a veteran prison official, would not follow the instructions given to him for Logue's care, and he was not negligent in turning Logue over to the jail.

II

The Federal Tort Claims Act imposes liability on the United States only for the negligent acts of an "employee of the Government" (28 U.S.C. 1346(b)). The negligent state jailers were not "employees of the Government" because the jail was not a "federal agency" under the Act and because the jailers were not "acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States" (28 U.S.C. 2671).

The Act's definition of "federal agency" excludes "any contractor with the United States" (*ibid.*), and the Nueces County Jail is a contractor. The principle underlying the contractor exclusion is central to the Act: that the United States, like a private person in similar circumstances, should not be held liable for the acts of those over whom it has no right of close supervision. Except where the United States has the authority to control the physical conduct of the contractor's employees in the performance of their duties under the contract, it is not liable for their torts. It is evident from the statute authorizing the Bureau of Prisons to contract for the housing of federal prisoners, from the contract with Nueces County, and from the

practice under that contract, that the United States has no such right of control over the jail's employees. The jail is, therefore, a "contractor" and not a "federal agency."

Similarly, the jail's employees were not "acting on behalf of" the Bureau of Prisons "in an official capacity * * * in the service of the United States * * *." That clause was not meant to depart from the fundamental principle of *respondeat superior;* it covers only persons who act under the direct supervision of the United States but whose relationship is other than one of employment, such as a "dollar-a-year" man or a member of a government advisory commission.

The Congress could not have intended that the United States be held liable for acts it has no authority to control or prevent. Under the theory advanced by petitioners, however, the government would be subjected to a potentially large burden of liability that it could not, as a practical matter, avoid. It has no authority to place federal employees in each of the 800 "contract" jails in the states, and, even if it did, a single person could not effectively control the state jailers' physical conduct in their handling of federal prisoners.

Finally, there is no basis for the contention that the Bureau of Prisons' statutory duty of care is "nondelegable." The legislation imposing that duty also gave the Bureau authority to enter contracts with state prisons. Moreover, petitioners' theory would impose on the government absolute liability without regard to fault. As this Court has held, the Act provides for

liability only for the wrongful or negligent acts of government employees and does not allow recovery based upon absolute liability.

ARGUMENT

I. THE DEPUTY MARSHAL VIOLATED NO DUTY OWED TO LOGUE; HE MET THE STANDARD OF DUE CARE BY RELYING ON THE ASSURANCES OF HIS SUPERVISOR AND THE COUNTY JAILER THAT LOGUE WOULD BE KEPT UNDER CONTINUOUS OBSERVATION

This Court held in *United States* v. *Muniz*, 374 U.S. 150, that a person may recover under the Federal Tort Claims Act for personal injuries sustained during confinement in a federal prison that were caused by the negligent acts of a federal employee. Although the Act specifies that the liability of the United States is to be determined "in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346(b)), the Court in *Muniz* held that "the duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 U.S.C. § 4042" (374 U.S. at 164–165). That section requires the Bureau of Prisons to "provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States" and to "provide for the protection, instruction, and discipline" of such persons.[11]

[11] Texas law at the time of Logue's death would have barred a suit against the state or the county for damages based on the negligence of the jail's employees. The State could not be sued without its consent (*Hosner* v. *De Young*, 1 Tex. 764), and it had not consented to suits on such tort claims. Although coun-

A United States Marshal owes a similar duty to a federal prisoner in his custody. He must, under 18 U.S.C. 4086, "provide for the safe-keeping of any person arrested, or held under authority of any enactment of Congress pending commitment to an institution." If, therefore, a marshal commits a negligent act or omission proximately causing injury to a federal prisoner in his custody, the United States is liable for damages under the Federal Tort Claims Act.

The question here is whether Deputy Marshal Bowers was guilty of any negligent act or omission that proximately caused Logue's death. The district court found that Bowers failed to make "specific arrangements" for the constant surveillance of Logue at the county jail (A. 608), and it concluded that this omission meant that his conduct failed to meet the applicable standard of care—*i.e.*, the "care necessary to make certain the prisoner did not commit suicide while in jail" (A. 610). The court of appeals did not set aside the narrow factual findings concerning Bow-

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ties and municipalities could be sued (Tex. Rev. Civ. Stat., Arts. 962, 1573), they were not liable for the torts of their employees. *City of Tyler* v. *Ingram*, 139 Tex. 600, 164 S.W. 2d 516; *Harris County* v. *Gerhart*, 115 Tex. 449, 283 S.W. 139. A negligent jailer, however, apparently could be held personally liable. See *Browning* v. *Graves*, 152 S.W. 2d 515 (Tex. Civ. App.).

The Texas Tort Claims Act, Tex. Rev. Civ. Stat., Art. 6252–19, effective January 1, 1970, has waived the immunity of state governmental units generally with respect to injury caused by the negligent acts of employees arising from the operation of automobiles or caused by the condition or use of real or tangible personal property. It is unclear whether the statute would permit a suit by a person claiming he was injured while incarcerated in a state prison.

ers, nor did it disturb the formulation of the standard of care. Rather, it held that under the particular circumstances Bowers had no duty to make "specific arrangements" for constant surveillance, and, implicitly, that the precautions he did take were reasonable and satisfied the standard of care.

That ruling was correct. Deputy Bowers, as the federal officer with physical custody of Logue, exercised due care in returning Logue to the county jail if he had a reasonable basis for believing that adequate preparations had been made for Logue's safekeeping and protection—that is, preparations which would ensure that the prisoner could not harm himself.[12] The district court believed that "constant sur-

[12] Petitioners do not here renew the argument, properly rejected by the district court, that Deputy Bowers was negligent in removing Logue from the hospital against Dr. Gwin's advice. As we have indicated, Logue was *not* removed against his physician's advice. Dr. Gwin recommended transferring Logue to another medical facility, but stated that he would release him for return to the jail in the meantime if a safe place could be prepared (A. 343, 359, 361). When assured by Bowers that the jail facilities would be safe, Dr. Gwin did release Logue (A. 336, 348–349). There would, in any event, have been no reason to keep him in the hospital, for he did not require continued medical treatment, and, if Deputy Jones' instructions had been followed, the jail would have adequately protected Logue against self-inflicted injury.

Moreover, as the district court held (A. 610), the decision to remove Logue from the hospital was the "performance [of] * * * a discretionary function or duty on the part of * * * an employee of the Government," for which the United States cannot be held liable "whether or not the discretion involved be abused" (28 U.S.C. 2680(a)). See *Dalehite* v. *United States*, 346 U.S. 15; cf. *Morton* v. *United States*, 228 F. 2d 431 (C.A. D.C.) (barring claim of prisoner that he was wrongfully transferred from jail to hospital).

veillance" was essential in the circumstances (A. 608), and we have no reason here to dispute that view. While Bowers did not personally arrange with the county jailer for constant surveillance of Logue, the record shows that his supervisor, Deputy Jones, did make precisely such arrangements.

In describing to Chief Jailer Lowrance the preparations that would have to be made for Logue's return to the jail, Jones emphasized that the cell would have to be "kept under surveillance" (A. 384), and he specifically suggested that one way to accomplish that objective would be to place jail trusties near Logue so that they "could watch him continually" (A. 402). Lowrance agreed that he would follow these suggestions (A. 407). Bowers was told of the arrangements that Lowrance had agreed to make, and his personal inspection of the cell and his conversations at the jail confirmed what he had been told. Since he, too, believed that Logue's safety required that he be kept under observation, he would not have turned Logue over to the jail if he had had any doubt that there would be such protective surveillance (A. 345–346, 352–353).

Deputy Bowers reasonably relied on what he had been told by his supervisor. Although he could probably have foreseen, at the time he transferred custody of his prisoner, that Logue would attempt suicide again, he could not reasonably foresee that the county jailers would fail to follow the explicit instructions of Deputy Jones, especially after his personal inspections of the cell and his conversations with the jailers

had confirmed his understanding that they had agreed to carry out those instructions.[13] Thus, any duty to Logue that was not met was a duty owed by the county jailers and not by Bowers.

It is not difficult, of course, with the benefit of hindsight, to speculate as to further precautions Bowers might have taken or questions he might have asked to obviate any confusion and perhaps prevent Logue's suicide. But the issue is not whether one can in retrospect conceive of ways to avoid the tragedy but whether, at that time and in the light of the circumstances as they then appeared, Deputy Bowers acted reasonably. We submit that he did, and that his failure to make "specific arrangements" for constant observation—that is, to do what he was reliably told had already been done by Jones and agreed to by Lowrance—was not a breach of his duty of care.[14]

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[13] There is nothing in this record suggesting that Lowrance's assurances should have been discounted. Indeed, Jones testified that Lowrance was a veteran prison official who "had had as much or more experience than I ever had in this sort of situation" (A. 384).

[14] The judges dissenting below from the denial of rehearing *en banc* may not have been aware of all the facts in this case, for their conclusion rests upon the erroneous suppositions (1) that "the Marshal made [no] reasonably diligent effort to assure proper supervision of the prisoner," and (2) that he permitted Logue to be "confined under circumstances which [he] knew were inherently dangerous in the absence of special precautions" (A. 626). As we have shown, Deputy Bowers' efforts to assure proper supervision of Logue, when viewed in the light of the circumstances as they then appeared, were reasonably diligent, and he reasonably believed that special precautions had

To the extent the district court's conclusion implied that Bowers should have personally supervised the physical operations of the jail in order to ensure that someone would be watching Logue at all times, the court of appeals correctly held that, as a Deputy United States Marshal, Bowers had no "power or authority to control any of the internal functions of the Nueces County jail" (A. 622), and thus could not have violated any duty of safekeeping by failing to take actual control of those internal functions.[15]

II. THE UNITED STATES IS NOT LIABLE UNDER THE FEDERAL TORT CLAIMS ACT FOR INJURY TO A FEDERAL PRISONER CAUSED BY THE NEGLIGENT ACTS OF EMPLOYEES OF A STATE PRISON IN WHICH HE IS CONFINED

The district court found that the employees of the Nueces County Jail were negligent in failing to provide adequate surveillance of Logue, knowing that he

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been taken by the county jailers to make the jail completely safe for the prisoner.

Similarly, the dissenters' supposed analog of a tubercular prisoner (A. 625) is inapposite, because it cannot be said on this record that Deputy Bowers failed to determine "whether the conditions of confinement reasonably assured survival" (*ibid.*). On the contrary, he had reasonably concluded that adequate safeguards would be taken.

[15] Neither the district court, the dissenting judges below, nor petitioners suggest that Deputy Jones failed to meet any duty owed to Logue, and this record could not support such an assertion. Jones carefully detailed to Lowrance the precautions that he thought necessary to ensure Logue's safety, including some form of surveillance. He received Lowrance's assurance that those precautions would be taken, and he instructed Bowers personally to inspect the jail's facilities to be sure they were properly prepared.

was seriously suicidal (A. 609). It held that, even if the Deputy Marshals had in all respects satisfied their duty of care with respect to Logue and not committed any negligent acts or omissions, the United States was "bound" by the negligent acts of the jail's employees and was liable for Logue's resulting death (A. 610–611).

The court of appeals did not disturb the district court's finding of negligence. It correctly held, however, that the United States is not liable under the Federal Tort Claims Act for the negligence of the jail's employees, because they are not "employee[s] of the Government" within the meaning of the Act.

A. THE STATE JAILERS WERE NOT "EMPLOYEES OF THE GOVERNMENT" BECAUSE THE UNITED STATES HAD NO RIGHT OF CONTROL OVER THE PHYSICAL CONDUCT OF THE JAILERS IN THE PERFORMANCE OF THEIR DUTIES

The Act authorizes tort suits based on the negligent acts "of any employee of the Government while acting within the scope of his office or employment" (28 U.S.C. 1346(b)). "Employee of the government" is defined by 28 U.S.C. 2671 to include (1) "officers or employees of any federal agency," and (2) "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation." [16]

Petitioners cannot prevail unless the Nueces County Jail is a "federal agency" within the meaning of

[16] The definition also includes "members of the military or naval forces of the United States," but that provision is not pertinent here.

Section 2671 or, if it is not, the jail's employees were nevertheless "acting on behalf of a federal agency [*i.e.*, the Bureau of Prisons] in an official capacity * * * in the service of the United States * * *." Although these issues are analytically distinct, the United States is not liable under either theory for essentially the same reason: neither the United States Marshal nor the Bureau of Prisons has any right to control or supervise the physical conduct of the jail's employees in performing the duties of their employment. Such a right of control is a precondition of government liability under the Act.

1. The jail is a "contractor" and not a "federal agency" within the meaning of the Act

Under the Act, "federal agency" includes:

> the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, *but does not include any contractor with the United States.* [28 U.S.C. 2671; emphasis added.]

If this provision is to be given its "plain natural meaning" (*Rayonier, Inc.* v. *United States*, 352 U.S. 315, 318), the Nueces County Jail cannot be a federal agency for purposes of tort liability, for it assumes custody of federal prisoners pursuant to contract with the Bureau of Prisons (A. 638–642). The Bureau is expressly authorized under 18 U.S.C. 4002, the

predecessor of which predated the Tort Claims Act, to contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of * * * persons [held under authority of any enactment of Congress.]

The legislative policy underlying the "contractor" exclusion applies with equal force to a contract governing confinement in a local jail as to any other independent contractor. Although the legislative history of the Act sheds little light on the meaning of the term "contractor," [17] its intendment is shown by the Act's principal purpose to make the United States liable on the same basis and to the same extent as private persons would be in similar circumstances. See, *e.g., Richards* v. *United States,* 369 U.S. 1, 6; *Indian Towing Co.* v. *United States,* 350 U.S. 61, 68–69. Thus, it has always been understood that the exclusion was intended to embody the common-law principle in apply-

[17] Almost thirty years elapsed between 1919, when the first bill to subject the United States to tort liability was introduced (H.R. 14737, 65th Cong., 3d Sess.), and the passage of the Act in 1946. During that time some 32 such bills were introduced in the Congress. The contractor's exclusion first appeared in proposed amendments to H.R. 5373, introduced in the first session of the 77th Congress. Its appearance was unremarked in hearings and reports accompanying that and subsequent bills. See, *e.g.*, Hearings on H.R. 5373 and H.R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess. (Jan. 29, 1942), in which some of the other amendments to H.R. 5373 were extensively discussed.

ing the rule of *respondeat superior*—that one who engages an independent contractor to perform work is not liable for the torts of the contractor or his servants.[18] See *United States* v. *Becker*, 378 F. 2d 319, 321 (C.A. 9); *Brucker* v. *United States*, 338 F. 2d 427, 428, n. 2 (C.A. 9).

The courts have accordingly held without exception that the United States cannot be held liable on the basis of the negligence of employees of independent contractors.[19] Unless there is a master-servant relationship between the United States and the tortfeasor, the government is not liable. *E.g.*, *Storer Broadcasting Co.* v. *United States*, 251 F. 2d 268 (C.A. 5), certiorari denied, 356 U.S. 951; *Sapp* v. *United States*, 227 F. 2d 280 (C.A. 5).

Whether such a relationship exists depends upon whether the principal controls or has the right to control the physical conduct of the contractor in perform-

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[18] Cf. *Laird* v. *Nelms*, 406 U.S. 797, 801: "Congress intended to permit liability essentially based on the intentionally wrongful or careless conduct of Government employees, for which the Government was to be made liable according to state law under the doctrine of *respondeat superior* * * *."

[19] See, *e.g.*, *Craghead* v. *United States*, 423 F. 2d 664 (C.A. 10); *Gowdy* v. *United States*, 412 F. 2d 525, 534–535 (C.A. 6); *Eutsler* v. *United States*, 376 F. 2d 634 (C.A. 10); *Yates* v. *United States*, 365 F. 2d 663 (C.A. 4); *United States* v. *Page*, 350 F. 2d 28 (C.A. 10), certiorari denied, 382 U.S. 979; *Buchanan* v. *United States*, 305 F. 2d 738 (C.A. 8); *Kirk* v. *United States*, 270 F. 2d 110 (C.A. 9); *Strangi* v. *United States*, 211 F. 2d 305 (C.A. 5).

ing the work contracted for. This is the common-law rule [20] as well as the law of Texas,[21] and it is the rule

[20] See ALI, *Restatement (Second) Agency*, § 2 (1958):

(1) A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service.

(2) A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.

(3) An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.

The factors which are taken into account in determining whether a master-servant relationship exists are set forth in ALI, *Restatement (Second) Agency*, § 220(2) (1958):

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

[21] *Wallace* v. *Southern Cotton Oil Co.*, 91 Tex. 18, 40 S.W. 399; *Elder* v. *Aetna Casualty & Surety Co.*, 149 Tex. 620, 236

which has been applied in suits under the Federal Tort Claims Act.[22]

It reflects the sound policy that one should not be held liable for the acts of those whom he has no right to control or supervise.[23] Were it otherwise, one might be required to respond in damages for negligence that he was without the power to prevent.

That the United States, through the Bureau of Prisons or the United States Marshal, neither has nor exercises any such right of control over the Nueces County jailers is shown by the statute authorizing the Bureau to contract with local jails, by the terms of the contract between the parties here, and by the practices under that contract.

In the same Act in which the Bureau of Prisons was established with the duty of providing for the care and safekeeping of federal prisoners, Congress, recognizing the lack of federal facilities for the local confinement of persons awaiting trial or held as wit-

S.W. 2d 611; *Great Western Drilling Co.* v. *Simmons*, 157 Tex. 268, 302 S.W. 2d 400; *Newspapers, Inc.* v. *Love*, 380 S.W. 2d 582 (Tex.).

[22] *United States* v. *Becker*, 378 F. 2d 319, 321–323 (C.A. 9); *Buchanan* v. *United States*, 305 F. 2d 738, 742–745 (C.A. 8) (Blackmun, J.); *Strangi* v. *United States*, 211 F. 2d 305, 307–308 and n. 10 (C.A. 5).

[23] Cf. ALI, *Restatement* (*Second*) *Agency*, § 219 (1958), comment a, p. 483:

"[A] servant is an agent standing in such close relation to the principal that it is just to make the latter respond for some of his physical acts resulting from the performance of the principal's business.

"The conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant. * * *"

nesses, expressly authorized the Bureau to enter into contracts with state and local authorities for that purpose (46 Stat. 325). Prior to the enactment of this legislation, arrangements for local housing of federal prisoners were not coordinated or properly supervised. The result, as described by the Attorney General in recommending the legislation, was that "penal authorities of some of the States are faced with the same overcrowded conditions which exist in the Federal prisons," that "it is becoming impossible for them to accept Federal prisoners as boarders," and that "conditions in some of the local jails are so insanitary and generally deplorable that the Federal Government does not feel it ought to use them." H. Rep. No. 106, 71st Cong., 2d Sess., p. 2; S. Rep. No. 533, 71st Cong., 2d Sess., p. 2.

To remedy these conditions, the Act gave the Bureau of Prisons the authority to establish contractual relations with the local jails, fixing the rate to be paid on the basis of "the character of the quarters furnished, sanitary conditions, and quality of subsistence" (18 U.S.C. 4002). Where conditions were overcrowded or otherwise inadequate, or where local authorities were unable or unwilling to provide suitable facilities at a reasonable cost, the Attorney General was authorized to erect a federal house of detention. 18 U.S.C. 4003, 4009.

There was no expectation that the Bureau would control the physical conduct of jail employees in their treatment of federal prisoners, and no provision was made for such control in the statute. The Attorney General's recommendation noted that there were some

900 local jails across the country in which federal prisoners were then confined. H. Rep. No. 106, *supra,* p. 2; S. Rep. No. 533, *supra,* p. 2. His analysis of the proposed legislation, upon which the House and Senate Committees relied, suggested that the objective was to improve conditions in those jails by offering the incentive of higher contractual rates and by employing more frequent inspections to screen out those jails which do not meet the minimum standards of suitability.[24]

The contract between the Bureau and Nueces County (A. 638–642) is consistent with this limited

[24] See H. Rep. No. 106, *supra*, p. 2:

"It is doubtful if the Federal Government ought ever to have a complete system of jails paralleling similar institutions now found in the political subdivisions of the various States. It is possible, however, for the central Government to improve conditions by certain administrative revisions of its present practices. More frequent inspections of local jails will also be of tremendous help."

We are informed by the Bureau of Prisons that there are now about 800 "contract jails" in the various states, housing on any given day some 4,000 federal prisoners. Each jail is inspected by a qualified Bureau employee at least once a year, and the more heavily populated prisons are checked more frequently. The Bureau's "Report of Inspection" form, which indicates the thoroughness of the inspections, is reproduced in Appendix B to this brief, *infra*, pp. 44–49. Although the Bureau does not maintain statistics on the number of contracts terminated because of unfavorable inspection reports, we are informed that there are several such terminations each year.

statutory objective.[25] It requires the county to provide for the "[s]afekeeping, care, and subsistence of persons held under authority of any United States statute" in accordance with the Bureau of Prisons' "rules and regulations governing the care and custody of persons committed" under the contract (A. 638). The agreement does not give the United States or its officers any right to supervise the physical conduct of the jail's employees. Rather, it reserves to the United States only "the right to enter the institution * * * at reasonable hours for the purpose of inspecting the same and determining the conditions under which federal offenders are housed" (A. 638).

The "rules and regulations" incorporated into the contract and appended to it commit to the jail's administrator "the responsibility * * * to keep the

[25] Petitioners argue (Br. 24–25) that the contract was illegal as applied to the detention of Logue, because, under Texas law (Tex. Rev. Civ. Stat., Art. 5115), a person "suspected of insanity, or * * * legally adjudged insane," may not be incarcerated in a jail. The contract between the Bureau and the county, however, is specifically authorized under federal law (18 U.S.C. 4002), and the applicable Texas statute directs jailers to receive and safely keep any prisoners tendered to them by a federal marshal (Tex. Rev. Civ. Stat., Art. 5117). On petitioners' reading of Article 5115, any prisoner awaiting transfer to a federal medical institution for a competency determination could not be housed, even temporarily, in a county jail. We think that Article 5115, read in the light of Article 5117, applies only to state prisoners. In any event, however, the confinement of Logue pending his transfer to a federal institution could not make the contract itself illegal and was not the proximate cause of Logue's death. It was the failure of the jailers to follow Deputy Jones' instructions, not the mere fact of confinement, that proximately caused the death.

prisoners in safe custody and to maintain proper discipline and control" (A. 639). While they specify the general standard of treatment for federal prisoners,[26] including the permissible methods of discipline,[27] and specify rules for communicating with attorneys, visitation privileges, mail, medical services, and employment, these provisions do not contemplate day-to-day federal supervision of the jail's handling of federal prisoners.

The contract is, in this respect, similar to a construction contract which, for example, establishes a general standard of workmanlike performance, gives in detail the specifications of the building to be constructed, and lists safety regulations to be observed. In neither case does the principal assert a right actually to supervise the physical process by which the contractor's employees perform the duties specified in the contract. That is the exclusive responsibility of the contractor. In these circumstances, under the general common law and the law of Texas, the principal is not liable for the torts of the contractor's employees (see pp. 22–23, nn. 20, 21, *supra*).

The practice under the contract with Nueces County accords with its terms and conditions. The record shows that, in special circumstances or under emer-

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[26] For example, prisoners must be held in "clean quarters adequately heated and ventilated," they must receive "adequate and wholesome food, and proper medical services," and they must "not be allowed special privileges or improper liberties" (A. 639).

[27] These are restriction of privileges, restricted diet (if approved by a physician), limited solitary confinement, and forfeiture of good conduct time.

gency conditions, the chief jailer would consult with the deputy marshal on matters relating to the treatment of federal prisoners (A. 437), and that the jailer would generally accommodate the special requests and suggestions made by the marshal (A. 406, 438). But this hardly suggests, as petitioners contend (Br. 19–23), that the marshal has control of the physical conduct of the jail's employees. It merely reflects the kind of informal cooperation that might be expected between a principal and his independent contractor, without altering the nature of their legal relationship.

Indeed, the contract itself contemplates such consultation with the marshal in special cases. Where the prison officials believe that a prisoner cannot be restrained by "reasonable methods," the contract obliges them to report the matter to the marshal, who will give appropriate instructions (A. 639). Similarly, the marshal must be consulted with respect to visitation rights when the United States Attorney considers them to be a danger to the public interest, with respect to mail in which a prison official finds contraband, and with respect to hospitalization in other than an emergency situation (A. 640). These requirements do not, however, give the marshal any right to control or supervise the day-to-day routine operations of the jail in its handling of federal prisoners.

Likewise, although Deputy Jones gave detailed instructions to the Nueces County jailer on the precautions that should be taken before Logue was returned,

and although Deputy Bowers twice inspected the cell to see that it had been properly prepared, neither Jones nor Bowers thereby undertook to control the jail's detailed handling of Logue. They were, rather, merely satisfying their duty to ensure that the jail's facilities were adequate for the safekeeping of a suicidal prisoner and that the jailers were fully apprised of the special arrangements that should be made to prevent Logue from harming himself.

This Court long ago recognized that a federal marshal is not responsible for the negligent acts of a state jailer who has custody of a federal prisoner. In *Randolph* v. *Donaldson,* 13 Cranch 76, an action of debt was brought against a marshal for negligently permitting a judgment-debtor to escape from the state jail in which he had been confined. The question presented was "whether an escape of a judgment-debtor, after regular commitment, under process of the United States courts, to a state jail, be an escape for which the marshal of the United States for the district is responsible" (13 Cranch at 84). The argument was made that the marshal should be held liable because he was charged by law with the custody of the prisonr and should not be relieved of that duty by transferring the prisoner to a state jail. The Court held, however, in words equally applicable here, that the marshal cannot be responsible for the negligence of those whom he does not control (*id.* at 85–86):

> The act of congress has limited the responsibility of the marshal to his own acts, and the acts of his deputies. The keeper of a state jail is neither in fact, nor in law, the deputy of the

> marshal. He is not appointed by, nor removable at the will of the marshal. When a prisoner is regularly committed to a state jail, by the marshal, he is no longer in the custody of the marshal, nor controllable by him. The marshal has no authority to command or direct the keeper, in respect to the nature of the imprisonment. The keeper becomes responsible for his own acts, and may expose himself by misconduct to the "pains and penalties" of the law. For certain purposes, and to certain intents, the state jail, lawfully used by the United States, may be deemed to be the jail of the United States, and that keeper to be keeper of the United States. But this would no more make the marshal liable for his acts, than for the acts of any other officer of the United States, whose appointment is altogether independent. And in these respects, there is a manifest difference between the case of a marshal and a sheriff. The sheriff is, in law, the keeper of the county jail, and the jailer is his deputy, appointed and removable at his pleasure. He has the supervision and control of all the prisoners within the jail; and therefore, is justly made responsible by law for all escapes occasioned by the negligence or wilful misconduct of his underkeeper.

Except for the district court in this case, the courts that have considered the issue have consistently held that state jails holding federal prisoners pursuant to contract with the Bureau of Prisons are independent contractors for whose negligence the United States is not liable under the Federal Tort Claims Act. *Rogers* v. *United States*, 302 F. Supp. 699, 708–709 (D. S.C.), affirmed *per curiam*, 426 F. 2d 311 (C.A. 4); *Brown* v. *United States*, 342 F. Supp. 987, 998 (E.D. Ark.); *Blair* v. *Anderson*, D. Del., Civil Action No. 4098, de-

cided December 19, 1972; *Hughes* v. *United States,* S.D. Cal., Civil No. 70–158–F, decided July 20, 1972; *Williams* v. *United States,* S.D. Cal., Civil No. 3241–SD–S, decided March 30, 1971 (unreported). As the court in *Williams* stated (slip op. 7):

> Congress must have known that United States Marshals in the states are not in a position to provide day to day supervision of the hundreds of local jails in which federal prisoners are kept. I think Congress must have known that when federal prisoners were placed in state jails the employees of local and state governments would actually be responsible for the protection of the prisoners and that that was the inevitable effect of a contract for the housing and safekeeping of the prisoners.

2. The jail's employees were not "acting on behalf of a federal agency in an official capacity"

If, as we have shown, the Nueces County Jail is an independent contractor and therefore not a "federal agency" under the Act, there remains the question whether its employees nevertheless were employees of the government because, with respect to federal prisoners, they were "acting on behalf of a federal agency," *i.e.*, the Bureau of Prisons, "in an official capacity." The argument, as framed by the dissenting judges on the denial of rehearing *en banc* (A. 628) is that, since the county jails "perform all functions incidental to the confinement of Federal prisoners that would otherwise be performed by the United States Marshal, * * * the Neuces County Sheriff and his deputies become surrogate Marshals for purposes of Federal tort liability."

The statutory language upon which this argument rests, however, is not meant to cover "surrogates" who are performing duties that might be performed by federal employees.[28] The purpose was to cover those persons who act under the actual supervision of a federal agency but whose relationship to the government is other than that of an employee in the usual sense of that term. Thus, the Act would cover the tortious conduct of a "dollar-a-year" man who is in service of the government without pay,[29] or an employee of a state or a private company who is placed under direct supervision of a federal agency pursuant to contract or special arrangement,[30] or perhaps persons appointed to serve without pay on a federal commission or board.[31]

The statute does not, however, in this respect depart from the central principle of *respondeat superior*. The critical question here, as in the case of the "contractor" exclusion, is whether the United States has the right to control the physical conduct of the person

[28] The provision applies to "persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation" (28 U.S.C. 2671).

[29] See 1 Jayson, *Handling Federal Tort Claims*, § 203.04 (1970); Gottlieb, *The Federal Tort Claims Act—A Statutory Interpretation*, 35 Georgetown L.J. 1, 11, n. 36 (1946).

[30] See 5 U.S.C. 3374(c)(2), which provides that a state employee assigned to a federal agency pursuant to statute (5 U.S.C. 2271–3376) is deemed an employee of the agency for various purposes, including federal tort liability. See, also, *Martarano* v. *United States*, 231 F. Supp. 805 (D. Nev.) (state employee placed under supervision of federal government pursuant to a cooperative agreement for controlling predatory animals and rodents).

[31] See 1 Jayson, *supra*, note 29.

in performing his duties. Thus, for example, it has been held that federally-licensed inspectors who are hired, fired, paid, and supervised by a state are not "acting on behalf of a federal agency" because no federal agency has a right to control their activities.[32]

In the recent case of *Blair* v. *Anderson*, D. Del., Civil Action No. 4098, decided December 19, 1972, involving the status of a state jail's employees for purposes of federal tort liability, the court correctly stated that "[o]ne of the prerequisites for inclusion within the class of 'employees of the government' * * * is a right of control by the United States with respect to the physical conduct of the alleged employee in the performance of the services involved" (slip op. 7). Though the court doubted that the claimant could demonstrate such control over the operations of a contract jail, it offered him an opportunity to submit evidence on the point.

As we have already demonstrated, the record here affirmatively shows that the United States has no such right of control over the Nueces County jailers. Like other state employees, presumably they are hired, fired, trained, disciplined, and supervised exclusively by state officials, and they are not required to follow the orders of any federal officer, even with respect to the care and treatment of federal prisoners.

The decisions relied upon by petitioners (Br. 15–17) do not suggest a contrary result here. They hold only

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[32] *Haynes* v. *United States*, 327 F. Supp. 264 (W.D. N.Y.), affirmed on opinion below, 443 F. 2d 375 (C.A. 2). See, also, *Lavitt* v. *United States*, 177 F. 2d 627 (C.A. 2); *Shippey* v. *United States*, 321 F. Supp. 350 (S.D. Fla.).

that, where there *is* a right of control, the tortfeasor may be a person "acting on behalf of a federal agency."

In *Close* v. *United States*, 397 F. 2d 686 (C.A. D.C.), the court held that employees of the District of Columbia Jail could be "persons acting on behalf of a federal agency," and it accordingly reversed the district court's dismissal of the complaint. It specifically noted that, on the record before it, there was no reason to assume that the Attorney General was without power "to supervise the D.C. jailer in his handling of this particular prisoner" (397 F. 2d at 687).[33]

As in *Close*, the decision in *Witt* v. *United States*, 462 F. 2d 1261 (C.A. 2), turned on the existence of a right of control. A military prisoner injured while on a work detail at the stables of the Fort Leavenworth Hunt Club was permitted to recover based on the negligent acts of a civilian employee of the Hunt Club who had been supervising the work detail. The court noted that the Hunt Club employee had been authorized by the Commandant of the Disciplinary Barracks to supervise the work detail and "was certainly amenable to some degree of control by the Disciplinary Barracks" (462 F. 2d at 1264). He was, therefore, "acting on behalf of" the Barracks.

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[33] On remand of that case, the government introduced evidence showing that the Bureau of Prisons does not exercise control over the D.C. Jail's employees, but the district court held the government liable (Civil Action No. 3039–66, decided July 6, 1971). The case is presently pending on appeal (C.A.D.C., No. 72–1657). The government's argument is that the record does not support the district court's finding of control.

3. Congress did not intend to subject the United States to liability under the Tort Claims Act for the negligence of employees of state jails

To impose liability upon the United States for the negligence of state jailers would result in a potentially large financial burden which the government could not avoid by its own conduct. The Bureau of Prisons has no authority to place its employees in the hundreds of contract jails for the purpose of supervising state employees in the performance of their duties, and there is no reason to think that the state prison officials would permit such direct federal supervision. Yet, unless the United States could exercise control over the physical operations of these jails with respect to their handling of federal prisoners, it would be unable to prevent or to guard against the very conduct that may lead to its liability. It would, in other words, be disabled from satisfying the duty it is deemed to owe to federal prisoners.

Even if there were legal authority to place a federal employee in each of the 800 state prisons housing federal prisoners, the Bureau of Prisons informs us that, taking into account vacations, holidays, and sick leave, round-the-clock manning would require five employees per prison. Even then, a single person without authority to hire, fire, discipline, or train the state jailers could in reality serve only as an observer and could not effectively control the physical handling of prisoners.

Congress could not have intended to impose that burden upon the federal government. The Bureau of

Prisons' authority to contract with local jails for the temporary confinement of federal prisoners was established 16 years before the Federal Tort Claims Act was passed, and the practice of using such jails for that purpose was encouraged and authorized from the beginning of the federal system.[34] Congress must have known that the federal marshals could not actually supervise the handling of the federal prisoners in those jails. There is no reason to believe that it intended in the Tort Claims Act to permit suits by such prisoners based on the negligence of state employees, for that would depart from the basic principle of *respondeat superior* upon which the Act is premised.

B. THE DUTY OF CARE OWED TO FEDERAL PRISONERS IS NOT "NON-DELEGABLE"

Petitioners argue that 18 U.S.C. 4042 "imposes an absolute, non-delegable duty" upon the Bureau of Prisons, which "cannot be avoided by the relinquishment of supervision over a federal prisoner" (Br. 17). They argue that "the duty of care and protection of federal prisoners is fixed on the United States and the United States should not be allowed to avoid that duty by simply substituting local jailers for United States Marshals pursuant to a contract" (Br. 18).

This argument is wrong for two reasons. In the first place, the statute imposing upon the Bureau of Prisons a duty of care towards federal prisoners

[34] See 1 Stat. 96, in which the Congress recommended by resolution that the states instruct their jail keepers to receive federal prisoners, and 1 Stat. 225, in which marshals were authorized to hire temporary jails.

was part of the same legislation in which the Bureau was given authority to enter into contracts for the housing of such prisoners in state jails (see pp. 24–26, *supra*). 18 U.S.C. 4002, 4042. As we showed above, Congress did not contemplate that the Bureau would exercise supervision in those state jails over the care of federal prisoners. Congress did not impose a non-delegable duty on the Bureau; rather, it specifically authorized the delegation of its duty in precisely the circumstances presented here.

In the second place, petitioners' contention is, in effect, that the United States should, in the case of injuries to federal prisoners caused by the negligence of state employees, be held liable absolutely and without regard to fault. That is, even though no employee of the United States has failed to meet any duty owed to the prisoner or committed any act of negligence, the government must respond in damages because the prisoner was injured by the tortious conduct of a nonemployee. The Act, however, permits recovery against the United States only for "personal injury or death caused by the negligent or wrongful act or omission of any *employee of the Government*" (28 U.S.C. 1346(b); emphasis added). There is no basis for liability except a federal employee's tortious conduct.

This Court only last Term held that the Act does not provide for liability without fault in circumstances where state law would impose such liability

on private persons. *Laird* v. *Nelms*, 406 U.S. 797. The contention there was that damage from a sonic boom caused by military planes created liability even though no government employee was negligent, because state law would impose absolute liability for injury resulting from ultrahazardous activity. The Court, reaffirming *Dalehite* v. *United States*, 346 U.S. 15, stated that "the Federal Tort Claims Act * * * precludes the imposition of liability if there has been no negligence or other form of 'misfeasance or nonfeasance' * * * on the part of the Government" (406 U.S. at 799). The Act does "not authorize the imposition of strict liability of any sort upon the Government" (*id.* at 803).

We submit that the result must be the same here. The few courts that have considered the question have correctly held that the United States is not liable to an injured federal prisoner for the torts of state jailers on a theory of nondelegable duty. *Brown* v. *United States*, 342 F. Supp. 987, 998 (E.D. Ark.); *Blair* v. *Anderson*, D. Del., Civil Action No. 4098, decided December 19, 1972, slip op. 8–10; see *Williams* v. *United States*, S.D. Cal., Civil No. 3241-SD-S, decided March 30, 1971 (unreported), slip op. 7–8. Any other result would make the United States an insurer of the safety of prisoners in state jails, which is not provided for in the Federal Tort Claims Act, or any other Act of Congress.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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APRIL 1973.

APPENDIX A

1. 28 U.S.C. 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. 28 U.S.C. 2671 provides:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

3. 28 U.S.C. 2674 provides in part:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

4. 18 U.S.C. 4042 provides:

The Bureau of Prisons, under the direction of the Attorney General, shall—

(1) have charge of the management and regulation of all Federal penal and correctional institutions;

(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States;

(4) provide technical assistance to State and local government in the improvement of their correctional systems.

This section shall not apply to military or naval penal or correctional institutions or the persons confined therein.

5. 18 U.S.C. 4002 provides in part:

For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Director of the Bureau of Prisons may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.

* * * * *

The rate to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.

6. 18 U.S.C. 4086 provides:

United States marshals shall provide for the safekeeping of any person arrested, or held under authority of any enactment of Congress pending commitment to an institution.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS

BP-CR-65
(Rev. 3-73)
FPI: 01—3-24-71-8117

REPORT OF INSPECTION

Facility No. _____ Telephone _____
Use Code _____

1. Name of institution _____ 2. State _____
3. District _____ 4. City _____ 5. County _____ 6. Zip _____
7. Street and No. _____ 8. Distance to center of town _____
9. Official in charge _____ 10. Title _____ 11. Term expires _____
12. How far to U. S. court? _____ 13. Where located? _____
14. How far to U. S. magistrate? _____ 15. Where located? _____
16. When was institution built? _____ 17. When renovated? _____
18. Normal capacity: Male: Adult ____ Juv. ____ Female: Adult ____ Juv. ____ Total ____

19. Population on day of inspection:

Total _____	Federal				Nonfederal			
	Adults		Juveniles		Adults		Juveniles	
	M	F	M	F	M	F	M	F
Awaiting trial or hearing								
Under jail sentence								
Under sentence awaiting transfer								
Immigration detainees								
Others								
Totals								

Federals _____ All Classes _____

20. Highest count on any day during past 12 months _____
Lowest count on any day during past 12 months _____
Average daily population during past 12 months _____

21. Check adjective rating for each factor:

	Good	Satisfactory	Poor
Administration			
Security and Discipline			
Building and Equipment			
Food Program			
Sanitation and Personal Hygiene			
Medical Services			
Inmate Programs			

22. Over-all adjective rating _____
23. Present authorized use of this institution (use symbols) _____
Recommended change, if any _____
24. Do you recommend this institution for prisoners presenting security hazards? _____
25. To what extent is this institution needed for federal use? _____
_____
26. Is an alternate institution available for federal use? _____
Location _____ Distance _____
27. What juvenile detention facilities are available in the community? _____
_____
28. Time spent on this inspection: In institution _____ Outside institution _____

Date of inspection _____
Signature of inspector

Name of institution _____

JAIL PROFILE DATA

29. Total number of employees _____ 30. Additional number needed _____
31. In what positions? _____
32. How many employees now employed have taken or are taking the following:
Jail correspondence course _____ Jail training classes _____ Academic classes _____
33. Do you recommend management assistance? _____ Has it been requested? _____
If so, what? _____ Estimate of cost _____

Inmate Programs

34. Indicate by a check mark which of the following programs are in effect or planned, then describe in narrative:

Programs	Active	Planned	Programs	Active	Planned
Counseling			Employment placement		
Classification			In-house employment		
Diagnostic study			Religious activities		
Crisis intervention			Physical education		
Work release			Leisure time activities		
Study release			Narcotics Anonymous		
General education			Alcoholics Anonymous		
Remedial education			Other		
Vocational training					

NARRATIVE

Give a narrative description of conditions in the institution, including any interesting or unusual features or incidents and any data concerning its administration not covered elsewhere in the report. A statement must be given for all areas listed in question 21. Include also a statement describing the facilities for women and juveniles and the method of handling these inmates.

At the beginning of the narrative give a **brief** summary covering the following points: (1) whether institution is authorized for federal use and to what extent and whether it is needed for federal offenders; (2) whether it is secure—describe security facilities, type of supervision, method of handling keys; (3) whether any irregularities or abuses were disclosed; (4) whether the food is adequate.

For the last section of the narrative, under the heading "General", list separately: outstanding problems; recommendations; and Bureau services desired.

Attach a copy of your letter (if any) to institution officials or others confirming your suggestions for improvement.

Summary

(Additional pages of narrative should be numbered 2a, 2b, etc.)

Name of institution _____

35. Indicate method of selecting personnel: Merit system _____ Other (describe) _____

36. Entrance salary for jailers _____ 37. Hours per week employees work _____
38. Number of Matrons _____ 39. Are there written rules for employees? _____
40. Is there any form of in-service training program? _____
41. Do officials know the regulations concerning handling of federal offenders? _____
42. Is there any evidence of disregard for the legal rights of prisoners? _____
43. Check records maintained: Arrest record _____ Personal history _____ Visits _____
Medical _____ Disciplinary _____ Cash and property _____ Commitment and discharge _____
Other (specify) _____
44. Do records supply reasonably adequate information? _____
45. What prisoners are fingerprinted? _____
46. Photographed? _____
47. Is a receipt given prisoners for their cash and property? _____
48. Are prisoners permitted to retain any cash in their possession? _____
49. Is there an inmate commissary? _____ What is done with the profits? _____

50. If there is no commissary, what method is used for procuring commissary items? _____

51. Is feeding of prisoners on a fee basis? _____ Daily rate _____
52. Who is in charge of procurement of supplies? _____

SECURITY AND DISCIPLINE

53. Is the institution reasonably secure? _____
54. Are adequate inspections made of security facilities? _____
55. Are firearms and other weapons stored safely? _____ Where? _____
56. Are there regulations prohibiting carrying firearms into the jail? _____
57. Are keys properly stored and accounted for? _____
58. Are keys ever in the possession of any prisoner? _____
59. Check type of communication between prisoners' quarters and front office: _____
Intercom _____ Sound monitor _____ Telephone _____ Public address system _____ Other _____
60. Is there a communications tie-in with any outside agency? _____
61. How often do jailers visit prisoners' quarters: Day _____ Night _____
62. Is a record or check made of night supervision? _____
63. How frequently are thorough shakedowns made? _____
64. How often are prisoners counted? _____ 65. Describe the system _____

66. Describe admission procedures _____

67. Describe release procedures _____

68. List any weaknesses noted in contraband control _____

69. Have advance plans been developed to meet emergencies in the event of disturbances, escapes, fires, etc.? _____
70. Describe visiting facilities _____
71. Are visits supervised? _____
72. When are visits permitted? _____
73. Are prisoners permitted to have visits from relatives? _____ Friends? _____
Attorneys? _____ Clergymen? _____

Name of institution _____

SECURITY AND DISCIPLINE (CONTINUED)

74. What type of articles may prisoners receive? _____

75. Are prisoners' mail and packages inspected? _____
76. Is written authority secured for inspection of mail? _____
77. What instructions are given new prisoners: Verbal _____ Written _____ None _____
78. Does it appear that effective and constant supervision is maintained? _____
79. Are prisoners' complaints given prompt consideration? _____
80. Do officials delegate any authority to prisoners? _____
81. Who selects trusties? _____ 82. What is the average number used? _____
83. Are full supervision and control maintained over them? _____
84. Who establishes disciplinary policies and procedures? _____
85. What types of punishment are used? _____
86. Describe solitary confinement facilities _____

87. What limit is placed on the duration of solitary confinement? _____
    Are adequate provisions made for maintenance of personal hygiene? _____
    How often are prisoners visited by officials? _____
88. Are dietary restrictions imposed as punishment? (If so, describe) _____

BUILDING AND EQUIPMENT

89. Describe the type of construction and material of the building, including floors, walls, windows, stairways, etc. _____

90. Is the building adequate in size for present needs? _____
91. Is building and equipment kept in satisfactory state of repair? _____
92. What changes, improvements, or remodeling are contemplated? _____

93. Are plumbing fixtures modern? _____ In good repair? _____ Adequate in number? _____
94. Were the following security features found adequate: Safety vestibules _____
    Protective screens on windows _____ Locking devices _____ Food windows _____
    Visiting facilities _____ Guard corridors _____ Observation windows _____
95. Were the following safety features found adequate: Emergency exits _____ Fire apparatus _____
    Stairways _____ Elevators _____ Cell locking devices _____
96. Describe any fire or safety hazards observed _____

97. Type of beds _____
98. Other furniture in cells and dayrooms _____
99. Is space available for additional beds in the event of overcrowding? _____

100. Does the institution have its own laundry? _____ How many? _____
101. Are there any special facilities: Receiving and discharge room _____ Sterilizer? _____
    Recreation room _____ Classrooms _____ Consultation room _____ Dining room _____
    Chapel _____ Other _____ Visiting room _____

NOTE: For the first description of a new or remodeled institution an itemized description of facilities must be submitted on Form BP-CS 05a.

Name of institution _____

FOOD PROGRAM

102. Is there a kitchen in the institution? _____ If not, where are the meals prepared?

103. Are kitchen and equipment adequate? _____
104. Is there a paid cook? _____ 105. Who manages the kitchen? _____
106. Who plans the menus?
107. Do inmates assist in the preparation of food? _____ Are they supervised? _____
108. Are adequate standards of sanitation maintained? _____
109. Describe eating utensils _____
110. Are they in good condition? _____ Where and how washed? _____

111. Hours when meals are served: Breakfast _____ Dinner _____ Supper _____
112. Give menu served on day of inspection: (Attach weekly menu if available) _____

Breakfast

Dinner

Supper

113. Do employees supervise the serving of meals? _____
114. Where are meals served?
115. Describe method of serving _____

116. Describe adequacy, variety, and nutritional balance of diet _____

SANITATION AND PERSONAL HYGIENE

117. Does the institution have a systematic cleaning program? _____
118. Is the work assigned and supervised by employees? _____
119. Are adequate cleaning tools and supplies provided? _____
120. Was there any evidence of vermin? _____
121. What methods are used for eradication? _____
122. Type of bedding issued _____
123. How often are linens laundered? _____ 124. Blankets? _____
125. Are new inmates issued clean bedding? _____
126. Is there an accumulation of food and other unnecessary articles in cells? _____
127. Is adequate hot water available? _____
128. Do prisoners have access to drinking water at all times? _____
129. Is heating system adequate for all sections of the institution? _____
130. What is method of ventilation? _____
131. Who controls heating and ventilation? _____
132. Is lighting, natural or artificial, inadequate in any section? _____
133. Is the paint in good condition? _____
134. Are institution uniforms furnished? _____
135. Do all inmates have access to bathing facilities? _____
136. Is soap furnished in sufficient quantity? _____ Towels? _____

Name of institution _____

SANITATION AND PERSONAL HYGIENE (CONTINUED)

137. How is barber service provided? _____
138. What provision is made for prisoners to obtain toilet articles? _____

MEDICAL SERVICES

139. Name of physician for nonfederal prisoners _____
140. Basis of payment for services _____
141. How often does he visit jail? _____
142. Name of physician for federal prisoners _____
143. How often does he visit jail? _____
144. Are there medical personnel other than the doctor? _____
145. Are all new prisoners given a medical examination? _____
146. What hospital facilities are available: In the institution _____
In the community _____
147. Describe sick call procedure _____
148. Is prompt attention given to prisoners' complaints of illness? _____
149. What medical supplies are kept at the institution? _____
150. How are they controlled and administered? _____
151. Does the institution have special facilities for handling: Insane? _____ Narcotic addicts? _____
Chronic alcoholics? _____ (If any such special facilities exist, describe in narrative) _____
152. What provision is made for dental work? _____

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